LIM HUCK CHIN

v.

MAJLIS PERBANDARAN PULAU PINANG

HIGH COURT MALAYA, PULAU PINANG
TUAN JEFFREY TAN JC
[CRIMINAL APPEAL NO. 41-171-1993]
27 MARCH 1995

ADMINISTRATIVE LAW: *Mandatory order - Premises not to be used as place of public entertainment without licence issued by Municipal Council - Order made pursuant to s. 91(1) of the Street, Drainage and Building Act 1974 - Whether work required of the appellant within the scope and ambit of s. 91(1) of the Act.*

ADMINISTRATIVE LAW: *Notice issued to appellant to cease use of premises as place of entertainment under s. 72 of the Street, Drainage and Building Act 1974 - Notice elaborating offences for infringement of by-laws - By-laws not contemplated by s. 72 - Notice flawed - Effect thereof.*

PRACTICE & PROCEDURE: *Mandatory order under s. 91(1) of the Street, Drainage and Building Act 1974 - Application for order made ex parte - Whether order could be granted ex parte - Whether order valid.*

PRACTICE & PROCEDURE: *Action taken against appellant/lessor for unauthorised use of premises - Premises occupied by lessee - Whether appellant proper party to proceedings.*

The appellant's lessee had been using the premises known as 24, Jalan Sultan Ahmad Shah, Pulau Pinang as a place of public entertainment, namely a discotheque known as Hippodrome which was operating under lesen hiburan awam issued by the District Office. The appellant was later issued a notice under s. 72 of the Street, Drainage and Building Act 1974 by the respondent for alleged infringement of several by-laws, and which required the appellant to cease use of the premise as a place of public entertainment, unless a separate licence was issued by the respondent. The respondent had subsequently by an *ex parte* application, obtained a mandatory order made pursuant to s. 91(1) of the Act for the appellant to stop use of the premise as a place of public entertainment without a licence. The appellant appealed against the order. It was also argued by the appellant that since he was not the occupier of the said premises, the appellant was wrongly made a party to the proceedings.

The operative word of s. 91(1) of the Street, Drainage and Building Act 1974 was "whenever any owner or ocupier is required under this Act to remove or erect any building or thing or to perform any other work to which the provisions of this Act apply" was severable into two limbs, ie, (i) whenever any owner or occupier was required under the Act to remove or erect any building or thing, or (ii) to perform any other work to which the provisions of the Act apply. Since the work required of the appellant was not covered by the first limb, the issue was whether it fell within the ambit of the second limb.

Held:

[1] The second limb plainly restricts "other work" to the work specified in the Act, but none of the works specified was for the "cessation of the use of the premises as a place of public entertainment". While a local authority may apply for a mandatory order compelling an owner or occupier to remove or erect any building or thing or to perform any other work to which

the provisions of the Act apply, yet s. 91(1) is limited to the scope of the Act and is not a provision with ubiquitous application for the enforcement of all local by-laws regardless whether it was made under the Act or other Acts or enactments.

[2] The Act provides no format for the notice required by s. 72, and by necessity a notice needs to be adapted. However the notice issued to the appellant was not only incoherent but grossly flawed. The preamble to the notice deposed to its issuance under s. 72, yet the infringment of other by-laws not made under or related to the Act was cited.

[3] Section 91(1) is silent on *ex parte* applications. The learned Magistrate deliberating on the respondent's *ex parte* application and examining the material before him was exercising a judicial function not contemplated by s. 91(1). It was emphasised in the case of *Eu Lian Hang v. President, Municipal Council, Petaling Jaya* [1992] 1 MLJ 691 that s. 91(1) order was a summary order. Such proceedings require full observation of the *audi alterum partum* rule, which the learned Magistrate failed to appreciate. The *ex parte* mandatory order was therefore invalid as judicial proceedings were conducted without compliance with the rules of natural justice.

[4] At the material time the respondent was fully aware that Hippodrome and not the appellant was occupying and using the premises as a place of public entertainment. The proceedings against the appellant were as such absent of the factual basis and wrongly instituted against the appellant.

[Appeal allowed; ex parte mandatory order set aside].

Cases referred to:
Chief Building Surveyor v. Makhanlall & Company Ltd. [1969] 2 MLJ 118 ***(refd)***
Eu Lian Hang v. President, Municipal Council, Petaling Jaya [1992] 1 MLJ 691 ***(refd)***
Kuching Municipal Council v. Chong Nyuk Lan [1982] 2 MLJ 344 ***(refd)***
PP v. Sivasupramaniam [1969] 2 MLJ 86 ***(refd)***

Legislation referred to:
Municipality of Georgetown, Penang By-laws, s. 2
Penang (Municipal) Control of Advertisement By-laws 1949, s. 3
Rural Board, Penang, Control of Advertisement By-laws 1949, s. 3
Street, Drainage and Building Act 1974, s. 70, 72, 91(1), 94(1), (2)

Other sources referred to:
Dictionary of English Law, Jowitt (2nd Edn.)
Law Dictionary, Black (6th Edn.)

For the appellant - S.P. Annamalai; M/s. Annamalai & Co.
For the respondent - Hassan Abdul Ghani, DPP.

JUDGMENT

Jeffrey Tan:

The learned Magistrate on 13 July 1993 ordered the appellant to stop the use of premises 24, Jalan Sultan Ahmad Shah, Pulau Pinang (said premises) as a place of public entertainment without a licence issued by the respondent. The order under s. 91(1) of the Street, Drainage and Building Act 1974 (the Act) was granted on the *ex parte* application of the respondent. Aggrieved by that order, the appellant appealed to this Court.

There was no dispute that:

(a) the premises were occupied by the appellant's lessee who was using it as a place of public entertainment, namely a discotheque known as "Hippodrome".

(b) on or about 17 June 1993, the respondent issued to the appellant a notice under s. 72 of the Act, (with one other notice to Hippodrome) regarding the appellant's alleged infringement of:

(i) section 2 of the Municipality of Georgetown, Penang By-laws with respect to places of public entertainment,

(ii) section 3 of the Penang (Municipal) Control of Advertisement By-laws 1949, and

(iii) section 3 of the Rural Board, Penang, Control of Advertisement By-laws 1949,

(c) the notice required the appellant to cease the use of the premises as a place of public entertainment.

(d) at the material time, Hippodrome had a lesen hiburan awam issued by the District Office, but the respondent required the appellant and Hippodrome to have a separate licence issued by the respondent,

(e) the appellant then applied to the respondent for that licence, but was yet to be issued with such licence.

The Act is divided into convenient parts, regulating streets, sewers and drains, backlanes and buildings respectively within the jurisdiction of a local authority. Part V of the Act regulating the construction of buildings also gives *inter alia* to a local authority, (i) control over the erection of building, and (ii) powers to give directions for the due compliance of building by-laws and the demolition or removal of unauthorised buildings or building works.

Section 72 reads as follows:

> Where the local authority is satisfied that a building has been erected or is in the course of erection or is about to be erected in contravention of s. 70 or if such building has been erected prior to the coming into force of this Act, in contravention of any law then in force relating to buildings and in respect of which building approval under any law was not given subsequently, the local authority may by notice served on the owner of the land require him to do any one or more of the following acts:
>
> (a) to abstain from commencing or proceeding with the erection of such building;
>
> (b) to demolish such building within such time as the local authority may specify; and
>
> (c) to take such steps as may be ordered by the local authority.

In addition the Act provides to a local authority the ordinance to compel compliance of its notice under s. 72; under s. 91(1) a Magistrate on complaint to him may make on an owner or occupier a summary order (referred to in the Act as a "mandatory order") requiring such owner or occupier to execute certain work required by the local authority. Section 91(1) reads as follows:

> Whenever any owner or occupier is required under this Act to remove or erect any building or thing or to perform any other work to which the provisions of this Act apply, and such owner or occupier after due notice fails to erect or remove such building or thing or to perform such work within the specified time, the local authority may make a complaint and the Magistrate's Court upon hearing the complaint shall make on such owner or occupier a summary order, in this Act referred to as a "mandatory order", requiring such owner or occupier to execute the required work.

The operative phrase in s. 91(1) is:

> whenever any owner or occupier is required under this Act to remove or erect any building or thing or to perform any other work to which the provisions of this Act apply

severable into two limbs, namely:

(1) whenever any owner or occupier is required under this Act to remove or erect any building or thing, or

(2) to perform any other work to which the provisions of this Act apply.

The work required of the appellant in the instant appeal was that he cease his use of the premises as a place of public entertainment. Obviously that was not work "to remove or erect any building or thing"; however it was not so obvious whether it fell within the ambit of the second limb, "to perform of any other work to which the provisions of this Act apply".

The second limb plainly restricts "other work" to the work specified in the Act, but none of the works specified was for the "cessation of the use of premises as a place of public entertainment". While a local authority may apply for a mandatory order compelling an owner or occupier to remove or erect any building or thing or to perform any other work to which the provisions of the Act apply, yet s. 91(1) is limited to the scope of the Act and is not a provision with ubiquitous application for the enforcement of all local by-laws regardless whether it was made under the Act or other Acts or enactment.

The preamble to the notices issued to the appellant and Hippodrome prominently deposed to its issuance under s. 72 of the Act. It was notice therefore to the appellant that he had erected or was in the course of erecting or about to erect premises in contravention of s. 70 of the Act. However, that preamble and reference to s. 72 were wrongly evoked as the complaint was entirely on the unauthorised use of the premises as a place of public entertainment and not against the unlawful erection of premises in contravention of the Act. The notice was undoubtedly incoherent for being a notice under s. 72, it particularised the appellant's contravention of s. 70 as the unlicensed use of the premises as a place of public entertainment, a contravention alien to the scope of s. 70.

The respondent's notice further detailed the appellant's infringement of (i) s. 2 of the Municipality of Georgetown, Penang By-laws with respect to places of public entertainment, (ii) s. 3 of the Penang (Municipal) Control of Advertisement By-laws 1949, and (iii) s. 3 of the Rural Board, Penang, Control of Advertisement By-laws 1949. The Act provides no format for the notice required by s. 72, and by necessity a notice needs to be adapted. However the notice issued to the appellant was not only incoherent but grossly flawed. The preamble to the notice deposed to its issuance under s. 72. Yet the infringement of other by-laws not made under or related to the Act was cited. That notice was exhibited in the respondent's application, and for scant other reason than a suggestion to the learned Magistrate that the Act was available to the respondent for its enforcement of the Municipality of Georgetown Penang By-laws with respect to places of public entertainment, the Penang (Municipal) Control of Advertisement By-laws 1949, and the Rural Board, Penang, Control of Advertisement By-laws 1949. That the learned Magistrate was impressed by the preamble and content of the notice was revealed in his grounds of judgment where he said at p. 2:

> Permohonan ini dibuat secara *ex parte* dan perintah termesti telah dikeluarkan. Mahkamah berpendapat bahawa tidak ada apa-apa halangan untuk Mahkamah ini mengeluarkan satu perintah termesti di bawah Sek. 91(1) itu kerana adalah jelas bahawa selepas mendengar permohonan secara *ex parte* dan berpuashati dengan affidavit yang dikemukakan maka Mahkamah berkuasa membuat demikian. Tidak timbul persoalan samada defendan diberi hak untuk didengar atau tidak.

That should be reason enough to allow the appeal, but there was more for the learned Magistrate after outlining s. 91(1) astonishing held:

> hak untuk dengar itu ujud semasa notis dikemukakan kepada beliau

when he issued the mandatory order. Under s. 94(1) if in any case a Magistrate's Court has jurisdiction to make a mandatory order and it is of the opinion that the matter complained of will be injurious or dangerous to public health or safety and the immediate execution of the work will not cause any injury which cannot be compensated by damages, the Magistrate Court by an *ex parte* order, may authorise the local authority to execute immediately such work. The injury and danger to public health and safety envisaged by s. 94(1) are too diverse but will encompass situations such as the likely or imminent collapse of derelict or run-downed buildings, structures posing a danger to the public, or the execution of construction works without proper or sufficient regard for the safety or health of the public.

In such situations the exigency to advert an existent danger to the public may be so pressing as would require the instant execution of the work, but not possible if a mandatory order is obligatory for the execution of the work required. Under such indigence, a Magistrate by an *ex parte* order may authorise the local authority to execute at once the required work to avert the current danger to public health and safety, and leaving temporarily aside the issues of the costs of the work and the payment of damages to any person aggrieved by the execution of the work.

However, the Magistrate's authorisation under s. 94(1) is not a mandatory order, for s. 94(2) specifically provides that damages will be payable by the local authority if an application for a mandatory order is subsequently refused, which latter provision is entirely unnecessary if the authorisation under s. 94(1) and the mandatory order under s. 91(1) are the same.

The corollary to sub-sections 94(1) and 94(2) is that a local authority even with an authorisation under s. 94(1) must apply yet for a mandatory order. The authorisation under s. 94(1) is only an *interim* order authorising the execution of urgent works by a local authority, and although there are no provisions enabling an application to set aside a Magistrate's authority (and such application would be academic after the execution of the works required) yet the local authority must justify its execution of the works at the hearing *inter partes* for a mandatory order. At the *inter partes* hearing, the Magistrate may either refuse the mandatory order and order the payment by the local authority of the damages sustained by any person by reason of its execution of the said works, or grant the mandatory order allowing thereby the local authority to recover the costs of the works executed under authorisation.

An authorisation under s. 94(1) as noted hitherto is not a mandatory order under s. 91(1). Unlike the provisions of s. 94(1) that permit within its provisos *ex parte* applications, s. 91(1) is silent on similar applications. However, it was solely to advert an immediate danger to the public that the *audi alterum partem* rule was relaxed in s. 94(1). The learned Magistrate deliberating on the respondent's *ex parte* application and examining the material before him was exercising a judicial function, but it was not contemplated by s. 91(1) nor should it be read as excluding the right of parties affected to be heard, but expressly provided for in s. 94(1) [see *Chief Building Surveyor v. Makhanlall & Company Ltd.* [1969] 2 MLJ 118].

Further an *ex parte* mandatory order is also not provided for in s. 91(1); in the case of *Eu Lian Hang v. President, Municipal Council, Petailing Jaya*, [1992] 1 MLJ 691 Shankar J (as he then was) at p. 695 clarified a s. 91(1) order as a summary order, a point emphasised by the learned Magistrate in his grounds.

Perhaps the best way to understand a summary order is to understand what is meant by summary proceedings. In *Kuching Municipal Council v. Chong Nyuk Lan* [1982] 2 MLJ 344, the learned Judge quoting from Jowitt's *Dictionary of English Law* (2nd Edn.) enunciated the meaning of the word "summary" as:

> an abridgement, a brief compendium; a summary application is one made to a Court or Judge without the formality of a full procedings. In procedure, proceedings are said to be summary when they are short and simple in comparison with regular proceedings, that is, in comparison with the proceedings which alone would have been applicable, either in the same or analogous cases, if summary proceedings had not been available ...

Black's *Law Dictionary* (6th Edn.) explains in a similar vein that summary proceedings are:

> proceedings by which a controversy is settled, case disposed of, or trial conducted, in a prompt and simple manner, without the aid of a jury, without presentation of indictment, or in other respects out of the regular course of the common law. In procedure proceedings are said to be summary when they are short and simple in comparison with regular proceedings; e.g., conciliation or small claims Court proceedings as contrasted with usual civil trial.

Summary proceedings are therefore simpler in procedure and less formal and the orders issued from such proceedings are summary orders. Nevertheless such proceedings are still nothing less than judicial proceedings requiring full observation of the *audi alterum partum* rule, which the learned Magistrate failed to appreciate.

The *ex parte* mandatory order was therefore invalid as judicial proceedings were conducted without compliance with the rules of natural justice moreover because the terms of the mandatory order were beyond the scope and ambit of s. 91(1).

The appellant further asserted that the occupier and user of the premises were Hippodrome, and any unauthorised use of the premises was certainly not the appellant's. In *PP v. Sivasupramaniam* [1969] 2 MLJ 86, the question reserved for the then Federal Court was:

> whether the owner of land, upon which there is erected an unauthorised building, is the only person who can be charged with the offence under the provision of s. 144(7) of the Municipal Ordinance (Cap 133).

It was answered in the negative by the Federal Court in the following words:

> the short answer, in our opinion, is that sub-section (12) was merely intended to impose liability on an ascertainable person where the actual culprit is unknown or cannot be traced. In that event, of course, the owner of the land on which the illegal building stands will be the only person against whom a mandatory demolition order can possibly be made, observance of s. 144 being expedient in the public interest. On the other hand, there is nothing in the sub-section which, by necessary implication, exonerates the actual offender when he is known and no insuperable obstacles prevent the prosecution from proving his guilt. While fastening liability on the landowner, it will be noted that the sub-section is completely silent as to third parties who contravene sub-sections (7) or (10) ... Therefore unless liability is clearly defined in s. 144 as being necessarily in the alternative, we do not feel compelled to hold that it must be so. Sub-section (12) does not declare that the owner shall be "solely liable". Hence we cannot see why creation of an absolute offence on the part of the landowner should be held incompatible with the occupier, in a proper case, or any other person being charged and convicted for his own wrongdoing.

At the material time the respondent was fully aware that Hippodrome and not the appellant was occupying and using the premises as a place of public entertainment; the proceedings against the appellant were as such absent of the factual basis, and furthermore as a result of the *ratio* in *PP v. Sivasupramaniam stare decisis* on this Court, wrongly instituted against the appellant.

The appeal was accordingly allowed and the learned Magistrate's *ex parte* mandatory order set aside.